Supreme Court, U.S.
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NO.

# IN THE SUPREME COURT OF THE UNITED STATES

**ARTHUR M. HAWKINS,**

**PETITIONER,**

**V.**

**UNITED STATES OF AMERICA,**

**RESPONDENT.**

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**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

**WHETHER THE COURT SHOULD GRANT THE WRIT TO RESOLVE THE SPLIT IN THE CIRCUITS REGARDING APPLICATION OF PLAIN ERROR ON POST *BOOKER* REMAND?**

**WHETHER THE REMEDY ANNOUNCED IN BOOKER PART II DENIES THE RIGHT OF A CRIMINAL DEFENDANT TO A JURY FINDING PROTECTED BY THE SIXTH AMENDMENT?**

**WHETHER A HEARING ON A *BOOKER* REMAND IS ESSENTIAL TO THE FAIR ADMINISTRATION OF JUSTICE?**

**WHETHER THE REASONABLENESS STANDARD ANNOUNCED BY THE REMEDIAL MAJORITY IN BOOKER, PART II SHOULD BE REVISITED AND REPLACED?**

**WHETHER THE DISTRICT COURT'S UNILATERAL REVIEW OF HAWKIN'S SENTENCE ON REMAND WAS REASONABLE?**

## THE PARTIES

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III. THE REMEDY IN BOOKER PART II DENIES A DEFENDANT'S SIXTH AMENDMENT RIGHT.

IV. THE CURRENT REASONABLENESS STANDARD OF REVIEW CREATES UNCHECKED DISPARITY.

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## PETITION FOR WRIT OF CERTIORARI

**Arthur M. Hawkins Petition for a Writ of Certiorari**

## JURISDICTION

On July 19, 2005, the United States Court of Appeals for the Seventh Circuit affirmed the Judgement of the United States District Court for the Southern District of Illinois and is reported at 139 Fed. Appx. 744 (7th Cir. 2005).

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1) and Rule 10, Rules of the United States Supreme Court.

## CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment

## STATUTORY PROVISIONS INVOLVED

18 U.S.C.S 1343
18 U.S.C.S 3237(a)
18 U.S.C. §3553(a)
18 U.S.C. §3661
18 U.S.C. §3553(b)(I)
18 U.S.C. §3742(e)

## STATEMENT OF THE CASE

Hawkins was represented at trial by Tom McQueen, Esq.. He changed lawyers on the eve of sentencing and replaced McQueen with Oscar Stilly, Esq.. Sentencing occurred on December 19, 2002 and Hawkins received the maximum ten year term. Stilly prepared and argued Hawkins appeal before the Seventh Circuit. Hawkins conviction and sentence were affirmed. However, the Court

of Appeals unsealed the original indictment in the case which had been permanently sealed by the district court at the government's request. Hawkins hired undersigned counsel to file an original petition for certiorari and a 28 U.S.C. § 2255.

Hawkins filed his original petition for certiorari raising only a venue issue. Theodore Olson, former Solicitor General in the brief in opposition to Hawkins original petition for certiorari challenging venue acknowledges, "...this case presents an unsuitable vehicle for resolving the analytical disagreement between the Courts of Appeals about permissible venue in Federal wire fraud prosecutions."

The petition for certiorari was denied June 21, 2004, three days before the release of *Blakely v. Washington*, 542 U.S. _, 124 S.Ct. 2531, 159 L.Ed. 2d 403 (2004). Pursuant to Rule 44 Supreme Court Rules, Hawkins filed a petition for rehearing due to an intervening circumstance of a substantial or controlling effect or other ground not previously presented. (*Blakely v. Washington*) Although not raised in Hawkins Rule 44 petition, another intervening circumstance existed post direct appeal with the unsealing of the original indictment. The unsealing, previously denied, revealed that exculpatory evidence was hidden by the prosecutor directly impacting the venue issue addressed in the original certiorari petition.

On January 24, 2005, this Court granted Hawkins petition for a writ of certiorari. *Hawkins v. United States*, 125 S.Ct. 1109 (2005). (App. A) Hawkins judgement was vacated and remanded to the Seventh Circuit for further consideration in light of *United States v. Booker*, 543 U.S., 125 S.Ct. 738, 160 L.Ed. 2d 621 (2005).

Pursuant to Circuit Rule 54 each party filed a statement of position as to the proper action in light of the

Supreme Court order. The government in its statement conceded, "that there was error, which is plain and obvious, when the district court sentenced defendant under the then-mandatory federal sentencing guidelines." The government went further to state, "the record is unclear whether the application of advisory guidelines may have altered the outcome of the sentencing proceedings and that, therefore, pursuant to this court's analysis in *Paladino*,[1] remand for re-sentencing consistent with *Booker* is warranted."

The district court invited the parties to submit a brief in support of re-sentencing and both parties complied. The district court did not allow a re-sentencing hearing and instead issued a nine page memorandum and order denying relief. (App. B) The Seventh Circuit invited the parties to address the denial and both parties complied. On July 19, 2005, the Seventh Circuit affirmed Hawkins sentence holding that the district court decision was reasonable. (App. C) This petition follows.

## STATEMENT OF FACTS[2]

On December 19, 2002, in the United States District Court for the Southern District of Illinois, Arthur M. Hawkins was tried and convicted of one count of conspiracy to commit wire fraud and one count of wire fraud in violation of 18 U.S.C. §1343. The trial judge was United States District Judge David Herndon. On October 27, 2004, Mr. Hawkins filed a petition for relief from conviction pursuant to Title 28, U.S.C., §2255. On the same day, Mr. Hawkins filed a motion to recuse Judge Herndon from hearing the 2255 petition based on the need to call the judge

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[1] 401 F.3d 471 (7th Cir. 2005)

[2] The rather involved statement of facts is being included to illustrate deprivation of Hawkins fundamental rights afforded by the United States Constitution.

as a witness in the matter. Judge Herndon denied the recusal motion on December 17, 2004. A petition for mandanus to the Seventh Circuit followed. It was denied on February 9, 2005.

Mr. Hawkins was Chief Executive Officer and Chairman of the Board of Directors of Exide Corporation, a battery manufacturer. In 1993, Exide bid on and won a contract to manufacture Die Hard batteries for Sears. Due to the product demands and growing pains, a number of defective batteries were produced. Mr. Hawkins was prosecuted for wire fraud and made illegal payments to a Sears buyer to protect his battery contract with Sears. Mr. Hawkins has always asserted his innocence and that the gratuity paid to the Sears employee had no bearing on the Sears contract. Post direct appeal with the unsealing of the original indictment, it was made clear that the gratuity paid had no bearing on the battery contract.

In his 2255 petition,[3] Mr. Hawkins alleges that he is innocent and that Assistant United States Attorney Miriam Miquelon, who led the prosecution, engaged in prosecutorial misconduct that denied him an opportunity to establish his innocence. United States Attorney Miquelon, post verdict, was under investigation in relation to several matters. Ms. Miquelon, who was appointed United States Attorney after Mr. Hawkins' trial, faced a tough confirmation battle in which her nomination was opposed by many people, including the Chief Judge of the United States District Court where she practiced. See http://www.belleville.com/mld/belleville/6265698.htm. She was confirmed, but resigned from her post less than a year later under questionable circumstances. See id. United States District Judge G. Patrick Murphy said she resigned because she was under federal investigation. See id.

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[3]The 28 U.S.C. §2255 is on stay pending resolution of this petition.

Nineteen stolen weapons were found at Ms. Miquelon's official residential address in the Southern District of Illinois. See http://www.illinoisleader.com/printer/article.asp?c=7250. Ms. Miquelon also was accused of altering an indictment after it was filed by the grand jury in another high-profile case to remove the name of a unindicted co-conspirator. See http://www.belleville.com/mld/belleville/7304649.htm. This is precisely Hawkin's claim in his 2255. AUSA Miquelon's prosecution of Mr. Hawkins was marked from the beginning by irregularities. For example, Ms. Miquelon brought the prosecution in the Southern District of Illinois,[4] although the only connection between the subject matter of the case and the District was Sears' sale and advertising of Die Hard batteries in the District. The prosecution also involved numerous irregularities in the use of the grand jury. Ms. Miquelon did not seek an indictment until twelve days before the end of the statute of limitations period, on January 19, 2001. The grand jury minutes refer to the filing of two indictments in this case on that day, although only one was ever unsealed. Most importantly, AUSA Miquelon fought vigorously to keep the original January 19, 2001 indictment of Mr. Hawkins sealed throughout his trial and appeal. Judge Herndon repeatedly granted her motions. As a result of her efforts and Judge Herndon's rulings, the indictment remained sealed until the United States Court of Appeals unsealed the indictment on appeal after Mr. Hawkins' conviction. Rejecting AUSA Miquelon's argument that continued sealing was required to protect an unindicted co-conspirator, the Court of Appeals found no justification for the sealing.

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[4]Hawkin's under separate cover seeks to supplement the record with information useful to this court's analysis. A breakdown of the exculpatory evidence revealed upon disclosure of the original indictment post direct appeal will be included as (Supp. App. A). This indicates Supplemental Appendix and item number.

The difference between the permanently sealed original indictment and the unsealed superseding indictment appeared minor at first glance, but indeed was very significant. Whereas in the sealed indictment, the grand jury named Sears as a co-conspirator, in the superseding indictment, those allegations were changed not only superficially to disguise Sears' identity, but also substantively to exculpate Sears, cast Sears as an unwitting victim, and place the blame for Sears' actions on Mr. Hawkins and his co-defendants. This was not a mere superficial change, but instead was a substantive change, the suppression of which had serious repercussions for the defense. It clearly hid the fact that the gratuity was paid to the Sears employee at the same time Sears knew from a battery teardown analysis that some batteries were defective. Exide offered to recall the batteries and Sears refused. Miguelon knew this but concealed the information.

Judge David Herndon repeatedly heard and granted AUSA Miquelon's motions to keep the indictment sealed, and turned down defense motions to unseal it. The record that is available shows that AUSA Miquelon gave a number of shifting, unclear, and now-discredited rationales for the motions to seal. For instance, while she originally argued that the sealing was required to allow her to resolve issues with regard to certain un-indicted targets she continued to object to unsealing even after all co-conspirators cases had been publicly resolved. She also mislead the Court by saying that other Fortune 100 companies other than the ones named in the indictment were involved, when that was patently not the case. In public proceedings, she consistently argued that the continued sealing was necessary in order to "protect" an unindicted co-conspirator, although the record shows this to be false. The only possible reason for Ms. Miquelon's zealous efforts to keep the indictment sealed even after Mr. Hawkins and all other co-conspirators had been convicted was to cover up her misconduct at the grand jury and hide exculpatory evidence inculpating Sears.